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No. 95-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OXFORD HOUSE-C., an unincorporated association; OXFORD HOUSE, INC., a Delaware not-for-profit corporation; OXFORD HOUSE-W., an unincorporated association; MISSOURI DEPARTMENT OF MENTAL HEALTH, DIVISION OF ALCOHOL & DRUG ABUSE,

Petitioners,

vs.

CITY OF ST. LOUIS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent the City of St. Louis respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 77 F.3d 249 (8th Cir. 1996).

STATEMENT OF THE CASE

This case was initially brought by Oxford House-C, an association comprising the residents of a group home in St. Louis for recovering alcoholics and drug addicts, and Oxford House, Inc., a corporation that organizes Oxford Houses and collected loan payments from Oxford House-C. Oxford House-W, another association of recovering alcoholics and drug addicts, was added to the suit later upon agreement of counsel. The sole defendant was the City of St. Louis, Missouri. The suit alleged that the Fair Housing Act exempted plaintiffs (sometimes referred to collectively herein as "Oxford House" or "petitioners") from the City's zoning and building code requirements, including the City's requirement that groups of nine or more unrelated, handicapped individuals must obtain a variance before occupying a single-family residence. Oxford House also claimed that the City's threatened enforcement of the its zoning and building codes violated myriad provisions of federal law, although their principal claims stemmed from the Fair Housing Act and the Rehabilitation Act. The City filed a counterclaim requesting that the court enjoin plaintiffs from violating the City's zoning code and existing structures code.[1]

Both Oxford House-C and Oxford House-W are located in neighborhoods zoned for single-family residential use. Oxford House-C opened with 11 unrelated, adult male residents[2] and Oxford House-W had 12 unrelated, adult male residents. The

[1] The Missouri Department of Mental Health, Division of Alcohol and Drug Abuse, a division of a department of the State of Missouri, later joined the case as a co-plaintiff. The United States of America intervened for the purpose of defending the constitutionality of the Fair Housing Act

[2] The number at Oxford House-C. was subsequently reduced to 10.

number of unrelated individuals permitted in single-family residences was addressed by both state and local law. The City's ordinance at the time Oxford House-C opened permitted up to three unrelated people to live in a single-family residence. State law, however, required cities to allow up to eight handicapped individuals and two houseparents to live together in single-family residences. §89.020.2 R.S.Mo.

Before and after Oxford House sued the City, considerable correspondence occurred between the attorney who made the zoning code enforcement decisions, City Counselor David Bohm, and various representatives of Oxford House and the State Mental Health Department. On numerous occasions Bohm made it clear that the City would follow the state law regarding housing for the handicapped (§89.020.2 R.S.Mo.) and allow eight recovering alcoholics and drug addicts to live at the Oxford Houses-C and Oxford House-W without a variance. But Bohm advised Oxford House that if it wanted more than eight handicapped individuals in either house, a zoning variance would be needed from the City.[3]

As a matter of national policy, Oxford House refuses to apply for variances or to submit to any local permitting requirement unless families must obtain the same permits.[4] In keeping with that policy, the residents of Oxford House-C and Oxford House-W refused to apply for a variance that, if granted, would have permitted more than eight handicapped individuals in the respective houses. Following Oxford House's refusal to comply with the City's zoning code, enforcement efforts began and Oxford House sued the City.

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[3] Building inspector Murphy also spoke with Oxford House representatives about appeals and variance applications. Tr. III, 122.

[4] Paul Molloy, executive chief officer of Oxford House, described the policy as follows:

> As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood. It considers itself no different from a biological family, and its members just move into any suitable house. City App. 324.

REASONS FOR DENYING THE WRIT

The Petition Should Be Denied Because It Is Based Solely On Issues of Fact Which Present No Important Questions Of Federal Law.

Petitioners dispute a number of fact issues considered by the appeals court and urge that this Court grant their petition of certiorari ("Petition") so that alleged mistakes concerning those fact issues may be revisited. Petitioners do not allege a conflict in the circuits. In fact the court of appeals decision is similar to the decision in *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994). No federal or state statute was declared unconstitutional; and petitioners do not contend that the issues raised in their Petition are especially significant. Supreme Court Rule 10(c). Moreover, the only consequence of the court of appeals' decision is that Oxford House-C and Oxford House-W will have to apply for variances from the City's zoning code if they wish to continue housing 10 and 12 residents, respectively. The City has not attempted to enforce its codes during the pendency of this litigation. Oxford House, without objection from the City, obtained a stay of the court of appeals' mandate while this Petition is being considered.

Petitioners dispute the court of appeals' application of the "clearly erroneous" standard as it pertained to their allegations that (a) City officials harbored an animus toward recovering drug addicts and alcoholics; (b) that Oxford House-C and Oxford House-W residents were treated differently from other groups; and (c) that no applications for zoning variances were required for Oxford House-C and Oxford House-W because such applications would have been futile. The contentions will be addressed in the order they were presented in the Petition.

A. Alleged Animus of City Officials

The first fact issue raised by petitioners is the alleged discriminatory motivation of certain City officials. Petition, p. 7. Although the court of appeals did address the motivation issue,

its discussion was prefaced with the conclusion that any such motivation was irrelevant because the City's zoning ordinance favored petitioners over other groups and because petitioners failed to show they were treated differently from other groups. App. A-5. Although the court of appeals held that the discriminatory intent issue was immaterial in light of its other findings, the court went on to address that issue because the magistrate made various findings on the topic.[5] App. A-5. It is clear from the decision that the court of appeals considered those findings unnecessary to reach its conclusion. Petitioners do not explain why they believe a discussion that amounts to dicta warrants examination by this Court. The court of appeals' comments concerning the magistrate's international discrimination findings did not directly affect the outcome and merit no consideration here.[6]

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[5] The court of appeals stated:

> Having concluded Oxford House did not show the City treated the Oxford Houses differently from any other group, we believe the City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts. Because the district court found the City's actions were motivated by bias and stereotypes, however, we will briefly discuss the evidence of discriminatory intent. App., A-5.

[6] Regarding the animus allegation, Oxford House focuses on a comment by the zoning administrator that he would not want to live next door to an Oxford House. Oxford House fails to note that the zoning administrator testified that would not want to live next door to *any* house with 10 or 12 young men living in it, regardless of whether it was a group home, fraternity house or other dwelling. Tr. III, 221-222. This is one instance of what the court of appeals meant when it said certain comments were taken "out of context." App., A-6.

Regarding the alleged animus of neighbors, the fact is that a single complaint to the Citizens' Service Bureau resulted in the City inspections of Oxford House-C. Tr. III, 76, 80; City App. 143. There was no organized neighborhood opposition and the affected neighborhood associations did not oppose the Oxford Houses. Tr. VI, 32. Nor had the alderman expressed opposition to the houses as the magistrate found. City App. 269-270.

Finally, even if the comments of the building inspector and zoning official are given weight, the law determines their authority and, thus, the weight that should be given to those statements. The magistrate viewed the statements as dispositive. She was wrong do so under Missouri law. Findings based on an erroneous view of the law may be reversed under the "clearly erroneous" standard. *Johnson v. Arkansas State Police*, 10 F.3d 547, 558 (8th Cir. 1993). It was David Bohm, the city counselor, who made the policy decision to enforce the City's codes. An individual municipal employee cannot act for the municipality unless he possesses authority under the law to do so. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 119 (1988). Building inspectors simply inspect buildings and report their findings. They do not make policy. The magistrate operated under an erroneous view of the law. *See also, Smith & Lee Associates, Inc. v. City of Taylor*, 13 F.3d 920, 930-32 (6th Cir. 1992); *Y.W.C.A. of Greater Kansas City, Inc. v. Dismas House of Kansas City*, 869 S.W.2d 894, 898-99 (Mo.App. 1994).

B. Differential Treatment

(1) Zoning Code

Petitioners challenge the court of appeals' judgment that they were not treated differently from other groups. As the court of appeals observed, the City's zoning provision favors Oxford House residents on its face. App. A-4. While no more than three unrelated people may live together in a single-family residence, up to eight unrelated handicapped people may do so. A-4.[7]

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[7] To the extent Oxford House argues that the City's "eight plus two" restriction discriminates on its face, such argument is not properly raised in this Petition because it is not pertinent to whether the court of appeals misapplied the clear error standard regarding certain fact determinations. In any event, the City's zoning code favors petitioners on its face (App. A-4) and petitioners presented no evidence that Oxford Houses were treated differently from other groups.

Petitioners attempt to finesse this point by stating that the zoning code treats Oxford House residents "differently" from others and that "different" treatment is necessarily "discrimination." Petition, A-14, 15. But here "different" means the code treats Oxford House better than other groups of unrelated people, not worse.[8] Handicapped individuals, including recovering drug addicts and alcoholics, enjoy benefits under the code that other groups do not.

Nevertheless, petitioners contend that the City's zoning code evidences a discriminatory animus against them because it allows bed and breakfast establishments in residential areas if a conditional use permit is obtained first. Petition, p. 16.[9] Petitioners apparently argue that they too should be allowed to apply for conditional use permits instead of variances. There is no reason to believe that the conditional use process is more or less preferable than the variance process. Nor is there any indication of any substantive difference between the two processes. Missouri allows use variances (§89.090 R.S.Mo.) and the City chose variance applications as the vehicle for considering requests for group homes with more than eight residents.[10] All of this argument is unnecessary, however, because Oxford House refuses to submit to any permit or variance procedure unless

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[8] In any event, an analysis of whether an ordinance is facially discriminatory is a legal that has nothing to do with petitioners' claim that the court of appeals misapplied the clearly erroneous standard in evaluating the magistrate's findings of fact.

[9] The Petition also notes that bed and breakfast districts may be created under the code where such uses would be permitted as a matter of right. Petition, p. 16. But there was no evidence any such districts were actually created or, if they were, whether they encompassed areas zoned for single-family use.

[10] Oxford House, although it did contend that the City's zoning code was inconsistent in establishing conditional uses (Oxford House Brief, p. 28), did not present this precise argument to the court of appeals.

families are required to do so.[11] Thus, it did not matter what process the City provided, Oxford House would not comply. Had the City's zoning code required conditional use permits for the two group homes, Oxford House still would have refused, the City Counselor still would have initiated enforcement efforts, and Oxford House still would have sued.

Finally, the City's group home provisions were well-suited to meet Oxford House's needs. It is consistent with the testimony of all the witnesses, including medical experts, who agreed that eight is a good number for an Oxford House from a therapeutic standpoint.[12] It is consistent with the requirement in 42 U.S.C. §300x-25(a)(1) that Oxford Houses have at least six residents to qualify for federal loan funds. It is consistent with §89.020.2 R.S.Mo. which requires Missouri cities to allow up to eight handicapped individuals to live together in single-family homes. And it is consistent with the fact that no Oxford House in the United States with eight or more residents has ever failed for financial reasons.[13]

(2) City's Treatment of Other Groups

The court of appeals decided that the Oxford Houses were not singled out for prosecution for two reasons. First, although Oxford House pointed to a small number of religious groups of more than three unrelated people in single-family zones, Oxford House failed to show whether or not those groups were "grandfathered" under the code's exception for pre-existing uses. App. A-5. Indeed, there was no evidence that anyone other than Oxford House violated the zoning code. Petitioners contend that

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[11] Tr. I, 62; City App. 232, 324.

[12] Tr. I, 79, 87-88 (Oxford House, Inc.'s executive director); Tr. II, 63-64 (Oxford House medical expert); Tr. VII, 11-12 (City medical expert); City App. 326-327.

[13] Tr. I, 88-89; City App. 341-343. A house in Jacksonville with 12 residents, referenced at Tr. I, 89, failed for other reasons. Tr. I, 77-78.

they produced "undisputed" evidence that those uses were not pre-existing uses under the code. In fact no conclusive evidence was presented on that point. Furthermore, the court of appeals observed: "At any rate, Oxford House did not show anyone in the building inspector's office knew of the alleged zoning violations." *Id.*[14] In other words, even if other groups actually did violate the zoning code, which was not established, the court of appeals would have ruled the same way because City officials were unaware of the violations. *Id.* The City could not treat one zoning code violator different from another when it was only aware of one of the violations.

In any event, the pre-existing use issue was raised by the City in its brief to the court of appeals and petitioners merely repeated their conclusions that other groups illegally occupy residences without benefit of conditional use permits or variances.[15] Petitioners should not be permitted to correct their omission in the court of appeals by raising other arguments for the first time in their Petition to this Court. Similarly, petitioners did not dispute, until now, that the City was unaware of the purported violations cited by petitioners. Petitioners should not be permitted to dispute that point now for the first time.

C. Oxford House Policy, the Variance Process and Petitioners' Futility Claim

Oxford House's claim under the Fair Housing Act that the City failed to reasonably accommodate Oxford House's housing needs (42 U.S.C. §3604(f)(3)(b)) failed because Oxford House never took advantage of the City's vehicle for considering accommodation requests — the variance process. App. A-6, 7. Oxford House attempts to justify its refusal to seek a variance by

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[14] This point does not contradict the magistrate's findings. The magistrate believed the City's lack of knowledge of other offenders was irrelevant, or even supportive of Oxford House's discrimination claims. App. A-47 n. 17.

[15] Oxford House Brief in court of appeals, p. 43.

asserting that the effort would have been futile because some neighbors and an alderman would have opposed any such applications. Petition, pp. 20-21.

As a preliminary matter, any perception of futility had nothing to do with Oxford House's decision not to seek variances. They did not apply because it is national Oxford House policy not to apply.[16] That "high-handed" policy is flawed and has no basis in the Fair Housing Act. *Village of Palatine*, supra, 37 F.3d at 1234 (concurring opinion).[17]

The magistrate's conclusions regarding futility were brief and apparently based on the premise that "neighborhood groups" opposed the subject Oxford Houses. App. A-55. That premise was clearly wrong because the neighborhood associations encompassing the two houses did not oppose (or support) the houses.[18] Given that fact, the magistrate's conclusion must have been based on the assumption that some individuals opposed Oxford House; and that they would appear at a variance hearing and oppose any Oxford House application; and that the City's Board of Adjustment necessarily would heed those objections. The magistrate made no mention of the evidence that the Board sometimes grants variances over aldermanic and neighborhood opposition. App. A-54, 55.

The evidence did not justify all of the magistrate's assumptions. Indeed, if the magistrate's reasoning had been upheld, any applicant for a variance could, once confronted with opposition from a neighbor or alderman, simply abandon the process, sue,

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[16] Tr. I, 62; City App. 232, 324.

[17] The City urges the Court to adopt the reasoning in *Virginia Beach*, 825 F.Supp. 1251 (E.D. Va. 1993), which provides the most thorough analysis of this issue to date.

[18] The neighborhood association near Oxford House-C actually met at the instigation of a neighbor-drug abuse counselor to assist Oxford House, not oppose it. Tr. Vol. VI, 24-28.

and evade the ripeness and exhaustion of remedies issues by claiming the variance process would have been futile. The magistrate's finding of futility was based on an erroneous view of the law, which justifies reversal under the "clearly erroneous" standard. *Johnson v. Arkansas State Police*, supra, 10 F.3d at 558. And given the fact that variance applications are sometimes granted in the City despite neighborhood or aldermanic objections,[19] the magistrate's futility conclusion was merely speculation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[19] Tr. Vol. VI, 15, 32; Petition, p. 21.